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IN THE

Supreme Court of the United States

October Term, 1945

EASTERN AIR LINES, INC.,

Petitioner,

—vs.—

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORP., PAN AMERICAN AIRWAYS, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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EASTERN AIR LINES, INC.,

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—vs.—

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORP., PAN AMERICAN AIRWAYS, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Eastern Air Lines, Inc., respectfully submits this petition for a writ of certiorari to review the judgment and decree (R. 433)* of the United States Cir-

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* Record references herein are to the printed record prepared and filed in connection with the petition of Pan American Airways Corporation and Pan American Airways, Inc. for writ of certiorari with respect to the same case. Paragraph 5 of the stipulation of the parties filed in this Court on April 10, 1946, in connection with that petition provides that the record so printed shall be entitled in each of any causes arising out of petitions for writ of certiorari filed by any party (R. 435-436).

cuit Court of Appeals for the Second Circuit entered and filed in that Court on February 25, 1946, in the case of *W. R. Grace & Co.* v. *Civil Aeronautics Board, Pan American Airways Corporation, Pan American Airways, Inc., Eastern Air Lines, Inc., et al.*, Docket 19520, 154 F. (2d) 271, decided January 28, 1946, rehearing denied February 21, 1946 (R. 351, 427).

The Circuit Court of Appeals for the Second Circuit has set aside the decision and orders of the Civil Aeronautics Board in the proceeding designated as Civil Aeronautics Board Docket 779, and has remanded said proceeding for further proceedings in conformity with the opinions of said Court dated January 28, 1946 and February 21, 1946.

Statement of the Case

This case involves a proceeding known as the "Panagra Terminal Investigation" (Docket 779) instituted by the Civil Aeronautics Board ("the Board") "upon its own initiative" (R. 52) pursuant to its orders dated September 10, 1942 (R. 50) and October 22, 1942 (R. 53). Such orders purported to be issued under "Titles II, IV and X of the Civil Aeronautics Act of 1938, as amended, particularly section 401 (h) thereof." The order of September 10, 1942 recited, among other things, the following:

> (1) That W. R. Grace & Co. ("Grace") and Pan American Airways Corporation ("Pan American") "each own 50 per cent of the stock of Pan American-Grace Airways, Inc." ("Panagra").
>
> (2) "That Grace has filed with the Board a petition (Docket No. 707) for the alteration, amendment and modification of the certificate of public convenience and

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necessity of Panagra pursuant to section 401 (h) of the Civil Aeronautics Act of 1938, as amended, so as to name a point within the United States as a terminal of Panagra's route."

(3) "That Grace in its petition, Docket No. 744, alleges that Panagra, because of the opposition of its 50 per cent stockholder, Pan American Airways Corporation, is not authorized by its Board of Directors and stockholders to make application to this Board for the amendment of its certificate of public convenience and necessity so as to provide for said terminal in the United States."

(4) "The Board finding that its action herein is necessary in order to carry out the provisions of, and to exercise and perform its duties under the Civil Aeronautics Act of 1938, as amended, and acting upon its own initiative and pursuant to the powers and duties vested in it under Titles II, IV, and X of the Civil Aeronautics Act of 1938, as amended, particularly section 401 (h) thereof;

"IT IS ORDERED:

"1. That a proceeding is hereby instituted by the Board to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United States • • • "

Pan American Airways, Inc. and Grace were made parties to the proceeding, as was Panagra itself (R. 52). Eastern Air Lines, Inc. ("Eastern") intervened in the proceeding, as did Pan American, National Airlines, Inc., Chicago & Southern Air Lines, Inc., TACA, S. A. and the Department of Justice (R. 37-38).

At the prehearing conference held to formulate the issues pursuant to the Board's regulations (R. 349), the following issues were established (R. 343):

> "I. Does the Board have the power to order the extension of an existing certificate by amendment when no application has been filed?
>
> "II. Does the public convenience and necessity require extension of Panagra's route to the United States?"

All parties concurred as to these issues.

Hearing commenced September 15, 1943, at which time Pan American filed a motion (R. 57) in which Eastern and others joined, to dismiss the proceeding for lack of jurisdiction, setting forth the specific ground that the Board could not under the Act order such an extension as contemplated in Docket 779 in the absence of an application. The motion was denied without prejudice to renewal at the close of the hearing (R. 38), and it was so renewed (R. 38).

By motion of December 2, 1943 (R. 67), Grace requested that argument on the motion to dismiss be deferred until final argument on the merits. This motion was denied (R. 49).

Briefs were filed and oral argument with respect to the motion to dismiss was heard on January 31, 1944. By

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order of May 24, 1944, the motion to dismiss was granted (R. 31). The Board's opinion concluded as follows (R. 46-47):

> "In the light of the conditions surrounding the extension here involved we conclude that the requiring of the extension would not be within the power granted the Board by section 401 (h) to 'alter, amend, [or] modify' Panagra's certificate. The length of the mileage of the new service and the amount of additional investment required to operate it have been factors in reaching this conclusion. However, the principal consideration which influences us is the fact that to extend the Panagra system from the Canal Zone to a point in Florida would constitute a basic transformation of the character of the carrier. Panagra, now a connecting carrier as to through traffic between the United States and South America, would be made a carrier directly serving that traffic—and serving it moreover in competition with an affiliated company. There is a fundamental difference between the position of a carrier whose routes stop so far short of the continental United States as those of Panagra and which depends upon connecting carriers for access to traffic to and from that area, and a carrier which has direct access to the continental United States over its own system. It does not seem reasonable to believe that Congress contemplated that such a change in the character of a carrier's system should be compelled by Government order. We find, therefore, that the extension of Panagra's route from the Canal Zone to the United States would not be an alteration, amendment or modification of its certificate within the meaning of

section 401 (h) of the Act in the sense that the Board could compel such an extension in the absence of an application from Panagra."

Grace filed a petition for reargument and reconsideration (R. 84) contending in substance that:

(1) The facts relied upon by the Board did not support the Board's decision (R. 86);

(2) The Board should have restricted itself to the general question of its power "to order a route extension for which no application has been made" irrespective of the facts of this case (R. 92);

(3) The Board should not have taken into consideration "any controversy between the co-owners of Panagra" (R. 101).

Grace's petition for reconsideration was denied (R. 48).

Grace's petition for review filed with the Circuit Court (R. 164) set forth substantially the same issues outlined in its petition for reconsideration filed with the Board. Briefs were filed with the Circuit Court and the case was argued on November 12, 1945. Under dates of November 29, 1945 and December 3, 1945 (see Appendix II, pp. 325-327, to Pan American's petition and brief filed in this Court), the Circuit Court requested supplemental briefs on the following points:

(1) Whether the proceeding under Docket 779 could be considered as involving Grace's "complaint" under Docket 744; and

(2) Whether the Board in Docket 779 could proceed to take action on some "petition for Panagra's extension" filed "derivatively" by Grace "on Panagra's behalf".

Supplemental briefs were filed as requested.

The Circuit Court's opinions held, in substance, as follows:

(1) That Docket 779 did not include either Docket 744 or Docket 707 (R. 369).

(2) That "for argument" the Board would be assumed "right in its holding, if Panagra was to be regarded as an unwilling carrier, and if therefore the only issue was whether the proposed extension could be forced upon it" (R. 369).

(3) That if Grace "could prove that the opposition of Pan American • • • to Panagra's applying for an extension was due to 'illegality and fraud', it would follow that this proceeding should be regarded as a voluntary application for the extension" (R. 371), since "a consent by a carrier to a 401 (h) extension proceeding begun by the Board is the legal equivalent of a petition for the same extension initiated by the carrier" (R. 431), and since something filed by Grace apparently was deemed by the Circuit Court to "speak for Panagra" (R. 372).

(4) That if an "application" were discovered in the manner indicated by the Circuit Court, then the Board should determine in Docket 779 "whether the public

convenience and necessity require the extension to be granted" (R. 373-374).

From the foregoing it will be observed that the *only* question presented to the Board or the Circuit Court was whether the Board had the power under Section 401 (h) of the Act to *require* Panagra, *in the absence of an application by Panagra,* to extend its system approximately 1200 miles north from the Canal Zone to the United States. The Board found (R. 38) and all parties conceded (R. 343) that this was the issue in the case. Thus, the Circuit Court's decision was based on a point never raised by any party either before the Board or before the Circuit Court—a point directly contrary to the findings of the Board and the concession of all parties.

Eastern and Pan American filed petitions for rehearing with respect to the Circuit Court's decision (R. 380, 402), but they were denied (R. 431). This petition for writ of certiorari seeks review of the decree (R. 433) of the Circuit Court, filed February 25, 1946, setting aside the orders of the Board and remanding the proceeding.

Jurisdiction

The Circuit Court of Appeals had jurisdiction of this case pursuant to Section 1006 of the Act (49 U. S. C., Sup. V, 646). The jurisdiction of the United States Supreme Court is supported by Section 1006(f) of the Act [49 U. S. C., Sup. V, 646(f)].

The judgment of the Circuit Court of Appeals was filed February 25, 1946; and this petition is being filed on or before May 25, 1946.

The statutory provisions involved in this case are set out at length in the Appendix to this petition and brief.

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The Questions Presented

The questions presented by this petition for writ of certiorari are the following:

(1) Whether the Circuit Court of Appeals may properly, under the Act and general principles of administrative law and due process, decide the case on review in reliance on an objection to the Board's order never raised by any party before the Board or the Circuit Court—an objection directly contrary to the findings of the Board and the position taken by all parties.

(2) Whether a stockholder has standing under the Act to file a new route application on behalf of the corporation merely upon the allegation that the corporation has failed to file such an application because of fraud and illegality.

(3) Whether the Circuit Court of Appeals properly held, contrary to the findings of the Board and the position taken by all parties, that the various filings made by Grace in Docket 779 and/or other proceedings should be considered an application in Docket 779 on behalf of Panagra.

(4) Whether the Circuit Court of Appeals may properly require the Board to consider and decide such an "application", if it exists, in the proceeding under Docket 779.

Reasons for Allowance of Writ of Certiorari

Question No. 1—As noted above, the Circuit Court of Appeals decided the case on a point never raised by any party before the Board (*i.e.*, that Grace had in some manner filed a "derivative" application on behalf of Panagra which should be considered as a part of Docket 779) or before the Circuit Court. Such action is directly contrary to Section 1006 (e) of the Act [49 U. S. C., Sup. V, 646(e)], which provides as follows:

> "No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

No "reasonable grounds" have been suggested for failure to present to the Board the objection on which the case was decided by the Circuit Court. The only attempted justification suggested by the Circuit Court for considering such objection is the following (R. 429):

> "Grace, before the Board, objected to the dismissal of the proceeding for want of jurisdiction in the Board; in its petition for review, Grace prayed 'for such other relief as to the court may seem just and proper in the circumstances.' With increasing emphasis, the Supreme Court has admonished us that, in court review of such administrative orders as this now before us, the public interest looms large. Accordingly, since this is not mere private litigation, overly nice scrutiny of the pleadings and undue stress on alleged estoppels have no place here."

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Since the entire Act is based on "the *public* interest" and "the *public* convenience and necessity" (Section 2; 49 U. S. C., Sup. V, 402), it is obvious that every party seeking review would be able to assert that his case did not involve "private litigation" but represented an attempt to vindicate "the public interest." Thus, if the Circuit Court's suggested justification (based in large part on a misinterpretation of decisions of this Court) were to be approved, Section 1006(e) would be effectively nullified.

Similar statutory limitations on review have been accorded greatest deference by the courts. *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 255-256 (1943); *National Labor Relations Board* v. *Cheney California Lumber Co.,* U. S. , 90 L. Ed. 572, 574-575 (February 25, 1946); *Todd* v. *Securities & Exchange Commission,* 137 F. (2d) 475, 477, 478 (C. C. A. 6th, 1943); *National Labor Relations Board* v. *J. G. Boswell Co.,* 136 F. (2d) 585, 597 (C. C. A. 9th, 1943); *National Labor Relations Board* v. *Elvine Knitting Mills,* 138 F. (2d) 633, 634 (C. C. A. 2d, 1943).

Furthermore, general principles of administrative law require that the reviewing court consider only questions presented to the administrative agency. *General Utilities Co.* v. *Helvering,* 296 U. S. 200, 206 (1935); *Helvering* v. *Tex-Penn Co.,* 300 U. S. 481, 498 (1937); *Helvering* v. *Cement Investors,* 316 U. S. 527, 535 (1942).

It follows that the *specific statutory* limitation on review contained in Section 1006(e) of the Act, and the established judicial precedents restraining review of administrative proceedings, would be rendered nugatory if this Court were not to correct the action of the Circuit Court in this case.

Moreover, the action of the Circuit Court in deciding the case on a ground not presented by the parties in briefs or

arguments deprived the parties of the judicial hearing required by due process. *Morgan* v. *United States*, 304 U. S. 1, 18 (1938).

Question No. 2—In its opinion, the Circuit Court held that (R. 371) "if Grace & Company could prove that the opposition of Pan American * * * to Panagra's applying for an extension was due to 'illegality and fraud', it would follow that this proceeding should be regarded as a voluntary application for the extension." In its opinion on rehearing the Circuit Court further held that (R. 431) "we adhere to the view that a consent by a carrier to a 401(h) extension proceeding begun by the Board is the legal equivalent of a petition for the same extension initiated by the carrier."

From these quotations and other indications in the Circuit Court's opinions, it appears that the Court believed that something which Grace had filed, either in Docket 779 or perhaps in other proceedings (possibly Dockets 707 and 744, to which the Circuit Court referred although the pleadings and other formal papers therein were not part of the record before the Circuit Court), constituted an "application" or "consent" on behalf of Panagra (provided, of course, that Grace could prove "fraud and illegality" on the part of Pan American in opposing such an application by Panagra itself).

Such a conclusion by the Circuit Court presupposes that Grace had standing to file an application on behalf of Panagra—a corporation in which it has only the interest of a 50% stockholder. The Circuit Court apparently thought (R. 370) that this Court had recently overruled or impaired its decision in *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 486-488 (1930), holding that one having *only* the interest of a stockholder lacked standing to obtain re-

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view of a decision of the Interstate Commerce Commission affecting the corporation. Plainly, the decision of this Court in *American Power and Light Co.* v. *Securities & Exchange Comm.*, 325 U. S. 385 (1945), relied on by the Circuit Court, has no such effect, but merely establishes that a stockholder having a *special* interest (specifically protected by the statute) has standing to obtain review of administrative action which would be *actively detrimental* where the corporation's management illegally and fraudulently refuses to seek review.

In the instant case Grace has no *special* interest, but only the interest of any stockholder, and no *active harm* to Panagra could possibly result from the Board's order, since both Panagra and Grace will be left in exactly the same position as before Docket 779 was instituted by the Board, and will still be in a position to file applications or press pending applications for any desired extensions.

This Court's intention to leave the *Pittsburgh & W. Va. Ry.* case, *supra*, intact and not to throw open public convenience and necessity cases for indiscriminate filings by stockholders merely on charges of "fraud and illegality", is demonstrated by the recent decision in *Schenley Distillers Corp.* v. *United States*, U. S. , 90 L. Ed. 217 (Jan. 2, 1946), reaffirming the *Pittsburgh & W. Va. Ry.* decision, distinguishing the *American Power & Light Co.* case, and holding that where "a party litigant asserts only its stockholder's derivative rights to have its subsidiary secure the permit" (the equivalent of a certificate of public convenience and necessity under the Act), it has no standing to obtain review.

In view of the Circuit Court's apparent misapprehension as to the effect of the recent decisions of this Court, and in view of the intolerable burden which would be placed on the Board if it were required to adjudicate countless private

intra-corporate disputes where mere stockholders charged the management with "fraud and illegality" and filed applications on behalf of the corporation, this Court is urged to correct the error of the Circuit Court's decree.

Question No. 3—As noted above, the Circuit Court held that Grace's various filings in this or other cases must be considered an application on behalf of Panagra if Grace could prove that Pan American "illegally and fraudulently" had prevented Panagra from filing such an application.

Such a conclusion is directly contrary to the theory on which the case was tried before the Board, and it is contrary to the position taken by all parties, including Grace (R. 92, 171), throughout the various steps of the proceeding. Moreover, it is contrary to the express finding of the Board —the expert agency charged with administration of the Act, and certainly the agency best qualified to ascertain what constitutes an application.

The Board specifically found that no application had been filed by or on behalf of Panagra (R. 10, 18), and the Circuit Court's failure to affirm that finding is in contravention of the established principle that administrative findings of fact are conclusive if supported by evidence, and that legal interpretations by an administrative agency will not be disturbed except for weighty reasons. *Brewster* v. *Gage*, 280 U. S. 327, 336 (1930); *Helvering* v. *Kehoe*, 309 U. S. 277, 279 (1940).

Section 401(b) of the Act [49 U. S. C., Sup. V, 481(b)] provides that "Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require." Pursuant to that provision of the Act, the Board has established

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regulations (Section 238.1) covering "applications for certificates of public convenience and necessity *or amendments thereof.*" A comparison of that regulation (quoted in the Appendix hereto) with any of Grace's filings in Docket 779 (or under Dockets 707 or 744—R. 314, 327) will demonstrate beyond question that, even if Grace were qualified to speak for Panagra, nothing resembling an application on behalf of Panagra has been filed. Moreover, an examination of that regulation [which, being promulgated pursuant to express statutory authority in the Act, is as binding as if part of the Act itself—*Atchison, T. & S. F. Ry.* v. *Scarlett*, 300 U. S. 471, 474 (1937)], will demonstrate that the Circuit Court is seriously in error in instructing the Board that a mere "consent" to a Section 401(h) extension proceeding "is the legal equivalent of a petition for the same extension initiated by the carrier." Moreover, nothing filed by Grace may be fairly considered a "consent" on behalf of Panagra.

The determination of what constitutes an "application" is specifically left by Congress to the Board (Section 401 (b), *supra*). Hence, it was error for the Circuit Court to instruct the Board to disregard its own regulations, and its own findings in this case, and to consider some "consent" (unidentified), filed in this case or some other proceeding, to be an application on behalf of Panagra.

Question No. 4—In addition to instructing the Board that Grace's filings *must* be considered an application if "fraud and illegality" are proved, the Circuit Court commanded (R. 373-374) the Board to decide such application as a part of Docket 779. This command constitutes an unwarranted interference with administrative discretion as to "the subordinate questions of procedure in ascertaining the public interest * * * the scope of the inquiry, whether applications should be heard contemporaneously or successively * * *

and similar questions." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940).

The Circuit Court's decree would have the effect of making *mandatory* a proceeding which the Board instituted "upon its own initiative" (R. 52), and therefore the decree is the equivalent of a mandamus to compel the Board to take action which "is regarded as involving the character of judgment or discretion," contrary to the principle established in *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543 (1937) and cases cited.

The Circuit Court's opinion (R. 430) seeks to justify this intrusion on the Board's discretion by referring to this Court's decision in *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. , 90 L. Ed. 119, 66 Sup. Ct. 148 (1946), and to a so-called "steady development in Supreme Court decisions of the doctrine that those seeking review of the orders of administrative agencies • • • are primarily vindicating the public, not a private, interest." Apparently, the Circuit Court felt that a part of such "steady development" was an overruling of the *Pottsville* case, *supra*, by the *Ashbacker* decision.

Plainly, the *Ashbacker* case is entirely consistent with the *Pottsville* case. In the *Ashbacker* case the Court held that, where *the administrative agency itself* had held that two applications were *mutually exclusive*, the granting of one without a hearing effectively denied the second applicant a hearing. The record in Docket 779 reveals not the slightest suggestion, let alone evidence, that any application exists which might foreclose the suggested extension of Panagra. The Circuit Court was able to say merely that "It is *not impossible*" that an extension of Panagra "might be frustrated by the intervening grants of licenses to other carriers" (R. 372-373).

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Thus, the Circuit Court seeks to extend the doctrine of the *Ashbacker* case from the situation where one application *clearly would* be foreclosed by the granting of another to the situation in this case where there is only the remote possibility, according to the Circuit Court, that such foreclosure might result. The vice of the Circuit Court's invasion of the administrative process is quite apparent in the fact that, having *created* an issue never suggested by any party, it found it necessary to base its ultimate decision either on a reference to material not in the record and not supporting that decision (R. 373), or on pure speculation (R. 431). It is hardly necessary to point out that the reference to material foreign to the record was improper. *St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38, 72 (1936); *National Labor Relations Board* v. *Newport News Co.,* 308 U. S. 241, 249-250 (1930).

Since the Circuit Court's invasion of the field of administrative discretion was based on a misunderstanding of this Court's decisions, such error should be corrected by this Court. The dangers of such an invasion are readily apparent. Docket 779 was tried on the theory, acquiesced in by all parties (R. 343), that no application had been filed on behalf of Panagra. It was also tried on the assumption that Grace's petitions under Dockets 707 and 744 were entirely separate and would be heard in separate proceedings (R. 361, 343). It was thus assumed that Pan American would have the opportunity under Docket 744 to establish the truth of its serious counter-charges against Grace—an opportunity which would be foreclosed if the Circuit Court's decree is allowed to stand, requiring the Board to treat Docket 779 as an "application" case if it finds that the charges made by Grace under Docket 744 are correct, regardless of the truth of Pan American's charges against Grace.

Because no Panagra application had been filed, Grace was treated as an intervenor in Docket 779, and thus had the opportunity to *cross-examine* Panagra's witnesses. If Grace had been considered as applicant on behalf of Panagra, it would not have had the right of cross-examination of Panagra's witnesses—certainly a substantial right. Hence, the record in Docket 779 cannot now be changed to a record in an "application" case without seriously prejudicing the rights of other parties.

Section 205(a) of the Act [49 U. S. C., Sup. V, 425] specifically authorizes the Board to establish such "procedure * * * as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act." And Section 1001 of the Act [49 U. S. C., Sup. V, 641] authorizes the Board to "conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice." Plainly the reviewing court should not be permitted to disrupt the procedure so established by the Board except on a showing that due process would otherwise be denied. In this case the exact reverse would be true: the revised procedure required by the Circuit Court's decree would deprive the parties of due process and would unwarrantedly interfere with administrative discretion.

CONCLUSION

From the foregoing it is apparent that the decision of the Circuit Court of Appeals raises important questions relating to the Civil Aeronautics Act of 1938, as amended, and the powers of the Board thereunder, which questions have not been decided by this Court. Such questions should be settled by this Court in the interest of orderly and just

administration of the Act. Furthermore, it is clear that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and from the proper scope of judicial review of decisions of the Board under the Act, as to call for supervision and correction by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Honorable Court, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

EASTERN AIR LINES, INC.
Petitioner,

By E. SMYTHE GAMBRELL,
Attorney for Petitioner.

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1945

EASTERN AIR LINES, INC.,

Petitioner,

—VS.—

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORP., PAN AMERICAN AIRWAYS, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

The Decision Below

The opinions of the Circuit Court of Appeals for the Second Circuit supporting the decree with respect to which review is sought here are reported in 154 F. (2d) 271. They are set forth in full in the printed Record (R. 351, 427).

In its decree, the Circuit Court set aside an order of the Civil Aeronautics Board ("the Board") in the Board's Docket 779 in which the Board held it had no power under the Civil Aeronautics Act of 1938 ("the Act") to compel

Pan American-Grace Airways, Inc. ("Panagra") to extend its system, presently confined to South and Central America, 1200 miles north from the Canal Zone to the United States, in the absence of an application by Panagra for such extension. No such application had been filed by Panagra because of a deadlock between its co-owners—Pan American Airways Corporation ("Pan American") and W. R. Grace & Co. ("Grace"), each of which owns 50% of Panagra's stock—Grace favoring such an extension and Pan American opposing it. The Circuit Court's opinions found, *arguendo*, that the Board was correct in holding that it could not *compel* such an extension, but in remanding the proceeding to the Board the Circuit Court directed the Board, in substance, that:

(1) If Pan American's opposition to the proposed extension of Panagra were the result of "fraud and illegality", then Grace's filings in Docket 779 or other proceedings constituted a "consent" on behalf of Panagra which should be considered the equivalent of an application for the extension; and

(2) If such an "application" were found to exist, the Board must proceed under Docket 779 to determine whether such application should be granted.

Grounds for Writ of Certiorari

The grounds for seeking a writ of certiorari are set forth in the annexed petition.

Statutory Provisions

The applicable statutory provisions are quoted in the Appendix to this petition and brief.

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Statement of the Case

The facts material to the consideration of the petition for writ of certiorari are set forth in full in the annexed petition, and will not be repeated here.

Errors to Be Urged

It is urged that the Circuit Court erred in the following respects:

(1) In deciding the case on review in reliance on an objection to the Board's order never raised before the Board or the Circuit Court and in direct opposition to the findings of the Board and the position taken by all parties throughout.

(2) In holding that a mere stockholder has standing under the Act to file a new route application on behalf of the corporation upon alleging that the corporation has failed to file such an application because of "fraud and illegality".

(3) In holding that some filing made by Grace in this or other proceedings constitutes an "application" on behalf of Panagra (provided the specified finding of "fraud and illegality" is made).

(4) In holding that the Board must consider and decide such an "application", if it exists, in Docket 779.

Summary of Argument

I. Under Section 1006 (e) of the Act, the reviewing court is prohibited from considering any objection "unless such objection shall have been urged" before the Board or

"unless there were reasonable grounds for failure to do so." Substantially the same rule is observed even in the absence of a statute reinforcing it. The objection on which the Circuit Court placed its decision was not presented to the Board, and no reasonable grounds have been advanced for failure to do so. Moreover, the objection was never raised before the Circuit Court, and the parties were never given a hearing on the point. Hence, it was error for the Circuit Court to decide the case on such objection.

II. It is settled law that one having *only* the interest of a shareholder in a corporation has no standing to obtain review of administrative decisions affecting the corporation, or to represent the corporation in public convenience and necessity cases. *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U. S. 479, 486-488 (1930); *Schenley Distillers Corp.* v. *United States,* U. S. , 90 L. Ed. 217, 66 Sup. Ct. 247 (January 2, 1946). This principle is not impaired by the decision in *American Power & Light Co.* v. *Securities & Exchange Commission,* 325 U. S. 385 (1945). It would be contrary to the purpose of the Act if the Board were required to depart from its function of considering *only* the *"public* interest" in order to arbitrate countless private intra-corporate disputes where stockholders claim the right to file new route applications on behalf of the corporation.

III. The Board specifically found, and all parties agreed throughout the proceeding before the Board and before the Circuit Court, that no application on behalf of Panagra had been filed for the extension involved. Nothing filed by Grace meets the statutory and administrative requirements for an application for new route authority. Hence, it was

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error for the Circuit Court to instruct the Board that anything presented by Grace could constitute an application in Docket 779.

IV. Decisions of this Court establish that an administrative agency is to be given full liberty to set up and follow its own rules and procedure as to the scope of proceedings, sequence of hearings, etc., except in the rare case where such rules and procedure would have the *certain* effect of depriving a party of the hearing to which he is entitled. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940); *Ashbacker Radio Corp.* v. *Federal Communications Comm'n*, 326 U. S. , 90 L. Ed. 119, 66 Sup. Ct. 148 (1945). Nothing in the record of this case suggests that the procedure adopted by the Board in this case will deprive either Grace or Panagra of a hearing on any legitimate application or complaint. Hence, the Circuit Court erred in ordering the Board to disrupt the orderly procedure established for hearing of this case and the hearing of other petitions and complaints; and such a disruption would deprive parties of important rights and due process of law.

ARGUMENT

I. *It Was Error for the Circuit Court on Review to Decide the Case on an Objection Never Presented to the Board.*

The Circuit Court has held that something filed by Grace, in this proceeding (Docket 779) or in Docket 707 or Docket 744 (which are not part of the record considered by the Circuit Court), constituted an "application" for a new route on behalf of Panagra provided that the Board should find that Pan American's opposition to such extension is based on "fraud and illegality". The suggestion that the Board should have considered such a possibility was never presented to the Board (or to the Circuit Court) at any time. Indeed, it is directly contrary to the position taken by all parties at all times (R. 343)—namely, that the sole question presented to the Board was whether the Board had the power, *in the absence of an application*, to extend Panagra's present route 1200 miles north from the Canal Zone to the United States. Yet the suggestion, raised for the first time by the Circuit Court itself, that the Board might have found an application to exist, forms the basis for the Circuit Court's reversal of the Board's decision.

It is a well established rule, even in the absence of a statutory provision reinforcing it, that a revewing court will not consider objections which were not presented to the administrative agency. *General Utilities Co.* v. *Helvering*, 296 U. S. 200, 206 (1935); *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 498 (1937); *Helvering* v. *Cement Investors*, 316 U. S. 527, 535 (1942). This rule is closely allied to the one requiring a party to exhaust all administrative remedies before seeking judicial review—a rule based on the principle that the expert administrative agency should first rule on all points within its field. *United States* v. *Abilene etc.*

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Ry., 265 U. S. 274 (1924); *Delaware etc. Co.* v. *United States*, 266 U. S. 438 (1925); *Beaumont etc. R. R.* v. *United States*, 282 U. S. 74, 87 (1930); *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50-52 (1938).

The usual rule forbidding consideration by the reviewing court of objections not raised before the administrative agency is greatly strengthened in this case by express statutory provision. Section 1006 (e) of the Act provides as follows:

> "No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

The language of this provision is clear on its face. Whatever power a reviewing court may have in cases where no similar statute is involved, plainly it has no power on review of a decision of the Board to raise *on its own motion* an objection not previously urged before the Board unless there were reasonable grounds for not urging such objection. Grace has advanced, and could advance, no reason for not having urged any available objection before the Board. Certainly Grace knew all of the facts, and it was not suffering from any disability or lack of adequate representation by counsel.

Similar statutory provisions have been accorded greatest deference by the courts. In *National Labor Relations Board* v. *Cheney California Lumber Co.*, U. S. , 90 L. Ed. 572, 574-575 (February 25, 1946), this Court had the following to say concerning Section 10 (e) of the National Labor Relations Act:

"A limitation which Congress has placed upon the power of courts to review orders of the Labor Board is decisive of this case. Section 10 (e) of the Act commands that 'No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.' We have heretofore had occasion to respect this explicit direction of Congress. *Marshall Field & Co.* v. *National Labor Relations Bd.*, 318 U. S. 253, 87 L. Ed. 744, 63 S. Ct. 585, and see *May Dept. Stores Co.* v. *National Labor Relations Bd.* decided December 10, 1945. By this provision, Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested. Cf. *Pope* v. *United States*, 323 U. S. 1, 89 L. Ed. 3, 65 S. Ct. 16. We can say of this case, as was said of the *Marshall Field & Co. Case*, 318 U. S. 253, 87 L. Ed. 744, 63 S. Ct. 585, supra, that it 'gives emphasis to the salutary policy adopted by §10 (e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order.' • • • Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. That is what the Board is for. It was therefore not within the power of the court below to make the deletion it made."

In *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 255-256 (1943), this Court said:

"We do not find that, at any stage of the proceedings before the Board, the objection now urged as to

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the Board's lack of power was presented to it or to any member or agent of the Board, or that there are any 'extraordinary circumstances' which would excuse such failure.

"Paragraph 2 (b) of the Board's order is in substance the recommendation of the intermediate report of the trial examiner. Yet petitioner's only objection to this part of the examiner's report was that the examiner had erred 'in making each and every recommendation'. Such a general objection did not apprise the Board that petitioner intended to press the question now presented, and may well account for the Board's failure to consider this question in its decision and to make findings with respect to it."

See also *United States* v. *Pierce Auto Freight Lines*, U. S. , 90 L. Ed. 629, 635, 66 Sup. Ct. 687 (March 11, 1946).

A similar statutory limitation on review is Section 24 (a) of the Public Utility Holding Company Act of 1935, concerning which the Circuit Court of Appeals for the Sixth Circuit had the following to say in *Todd* v. *Securities & Exchange Commission*, 137 F. (2d) 475, 477, 478 (C. C. A. 6th, 1943):

"Section 24 (a) requires as a condition precedent to the right to review an order of the Commission that the objections made shall have been urged before the Commission or that there were 'reasonable grounds for failure to do so.' * * * Under Section 24 (a) * * * consideration is forbidden of certain points raised here for the first time, such as that dissolution of the System cannot presently be made in advance of decision by the Commission as to action required of the subsidiary companies, or that the order is vague and

> uncertain • • • Since the Commission is not empowered to rule upon the constitutionality of statutes, the fact that the constitutional objections were not raised before it, as a matter of abstract justice perhaps should not preclude the assertion of such questions in this court. But the wording of Section 24 (a) is inclusive enough to embrace every kind of question, whether of law or fact. The Commission was established by congressional enactment, and the right to review its order likewise is given by Congress. Conditions under which the right may be exercised are within the power of the Congress to define, and one condition is that any question relied on in this court must have been urged before the Commission. We conclude that the constitutional questions are not before us."

It would seem obvious that, if questions which could not be decided by the administrative agency are nevertheless beyond the power of the court to review where they have not been presented to the agency, the question on which the Circuit Court based its decision in this case could not properly be considered on review. The Board had full power to decide whether anything filed by Grace could be considered an application on behalf of Panagra, as recognized by the Circuit Court in remanding the proceeding for that very purpose. As the court said in *American Power & Light Co.* v. *Securities & Exchange Commission*, 141 F. (2d) 606, 612-613 (C. C. A. 1st, 1944): "there can be no doubt that under §24 (a) petitioners were obliged to raise before the Commission issues as to the Commission's statutory authority to issue the contemplated orders."

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The Court's attention is also called to the following additional decisions relating to statutory provisions similar to Section 1006 (e) of the Act: *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 597 (C. C. A. 9th, 1943); *National Labor Relations Board* v. *Elvine Knitting Mills*, 138 F. (2d) 633, 634 (C. C. A. 2d, 1943); see also *Armour & Co.* v. *Brown*, 137 F. (2d) 233, 239 (Emergency Court of Appeals, 1943).

In its opinion on petitions for rehearing the Circuit Court apparently sought to justify its action in this case with the following statement (R. 429):

> "Grace, before the Board, objected to the dismissal of the proceeding for want of jurisdiction in the Board; in its petition for review Grace prayed 'for such other relief as to the court may seem just and proper in the circumstances.'"

It is obvious that a mere general objection to the Board's action does not meet the requirements of Section 1006 (e). As this Court said in the *Marshall Field & Co.* case, *supra*, 318 U. S. 253, 255-256:

> "Such a general objection [that the examiner had erred 'in making each and every recommendation'] did not apprise the Board that petitioner intended to press the question now presented, and may well account for the Board's failure to consider this question in its decision and to make findings with respect to it."

Similarly, in the *American Power & Light Co.* case, *supra*, 141 F. (2d) 606, 612-613, the court rejected as insufficient under Section 24 (a) of the Public Utility Holding Company Act a general reservation by the petitioner of the

"right to full judicial review of the said findings, opinion and order."

Section 1006 (e) of the Act would be rendered nugatory if a mere general objection were sufficient to raise the specific objection on which the Circuit Court's decision is predicated. The Circuit Court advances the theory (R. 429) that Grace's failure to raise the objection before the Board should be excused because "this is not mere private litigation" and "in court review of such administrative orders as this now before us, the public interest looms large." Yet it must be observed that Congress put the limitation on review in *a statute which deals with nothing but* the "*public* interest" and the "*public* convenience and necessity" (See Section 2 of the Act which defines the entire purpose of the Act in terms of those two phrases). In such a setting, it is plain that Congress intended that Section 1006 (e) should mean exactly what it says, and should not be avoided by every petitioner seeking review on the theory that he is "vindicating the public interest."

Finally, it is worthy of note that, not only was the objection not raised before the Board, it was not raised before the Circuit Court, and it was never suggested until after briefs and arguments had been presented. No hearing was granted on the point which finally was decisive in the Circuit Court's decision. Since the Circuit Court's theory was directly contrary to the position taken by Grace throughout the proceeding and on appeal (R. 92, 171), naturally the parties did not present argument on the subject, and they were never given an adequate opportunity to point out the fallacy in the Circuit Court's theory until after the decision had been reached. We submit that it is not the function of a reviewing court, in the very limited type of review authorized by Congress under the Act, to

originate arguments not advanced by counsel and directly contrary to the position of all parties and the Board throughout all stages of the proceeding. Moreover, such procedure on the part of the court deprives the parties of the fair hearing to which they are entitled in both administrative and judicial proceedings. *Morgan* v. *United States*, 304 U. S. 1, 18 (1938).

II. *Grace Has No Standing to File a New Route Application on Behalf of Panagra or to Represent Panagra in This Proceeding.*

The Circuit Court's conclusion that something Grace has filed must be considered an "application" on behalf of Panagra if the inability of Panagra to file is due to "fraud and illegality" rests on the novel proposition that a mere stockholder has the right to represent the corporation before an administrative agency and *force the corporation to expand its business or extend its routes* if he can prove that the corporate management was prevented by improper influences from taking such action. This is the first case in which it has been suggested that a stockholder could appear initially before the administrative agency with a new route application.

It has been considered settled that a person having no interest other than that of a stockholder cannot speak for the corporation in attacking an administrative order. In *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 486-488 (1930), this Court said:

> "The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholders' interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order."

The Circuit Court's opinion recognized (R. 370) that the *Pittsburgh & W. Va. Ry.* case "might" be conclusive in this case "were it not for the decision" in *American Power & Light Co.* v. *Securities & Exchange Commission*, 325 U. S. 385 (1945). The latter decision appears to establish that if a stockholder can prove that he has a *special* interest, apart and distinct from the interest of the corporation, or that something alleged to be *actively detrimental* to the corporation is about to be done, because of the illegal and fraudulent action or inaction of the corporation's management, he may appear in defense of his own interests. In this connection, it must be remembered that the Securities & Exchange Commission is charged by the Public Utility Holding Company Act of 1935, under which the *American Power & Light Co.* case was decided, with the task of protecting "investors" as well as the public generally.

We do not believe that it was the intention of the Supreme Court in deciding the *American Power & Light Co.* case to throw open all administrative proceedings to applications, interventions, etc. by innumerable stockholders claiming that the managements of their respective corporations are improperly withholding action on the stockholders' pet projects. That such was not the intention of this Court, and that the *Pittsburgh & W. Va. Ry.* case is not basically modified, is clearly indicated by the decision of this Court in *Schenley Distillers Corp.* v. *United States*, U. S. , 90 L. Ed. 217, 66 Sup. Ct. 247 (January 2, 1946), where the Court said:

> "The district court rightly held that the parent corporation had no standing to sue. It did not ask that a permit be issued to it, and its sole interest in the permit sought for its co-appellant was that of a stockholder. We have held that a minority stockholder of a carrier

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corporation cannot bring suit to set aside a commission order against the corporation. *Pittsburgh & W. V. R. Co.* v. *United States*, 281 U. S. 479, 486-488, 74 L. Ed. 980, 983, 984, 50 S. Ct. 378. A parent corporation which by its stock ownership controls its subsidiary, and which as a party litigant asserts only its stockholder's derivative rights to have its subsidiary secure the permit, cf. *American Power & L. Co.* v. *Securities & Exchange Commission*, 325 U. S. 385, 389, 89 L. Ed. (Adv. 1179, 1180), 65 S. Ct. 1254, is even less aggrieved by the commission's order denying the permit than would be a minority stockholder."

Thus, it appears to be still the law that one having only the interest of a stockholder in the welfare of the corporation has no standing to represent the corporation in administrative proceedings. And that principle has been affirmed in a case quite close to the present case—one in which the stockholder is intervening in an effort to obtain for the corporation a permit or certificate of public convenience and necessity.

In this case Grace has no possible interest separate and apart from that of the corporation of which it is a shareholder. No active harm is threatened as regards either Grace or Panagra. Nothing is to be taken away from either as a result of the Board's order, and they remain, as they always have been, free to file any applications, petitions or other documents, and Grace is free to press for hearing on its petition under Docket 707 and its complaint under Docket 744. Indeed, Grace might have pressed those matters at any time, but it chose to rely on the proceeding under Docket 779 which the Board started "on its own initiative."

The Circuit Court has stressed (R. 429) the fact that the *public* interest is of paramount importance under the Act. This is true, to the point that there is not the slightest

suggestion in the Act that the Board is expected to arbitrate or attempt to compose private intra-corporate disputes among stockholders, and it is clear that the Board's functions in behalf of the public interest are not to be frustrated by the necessity for determining in the many new route proceedings which come before it what stockholder interest is entitled to "speak for" the corporations involved.

III. *The Board Has Correctly Found and All Parties Have Conceded That No Application Has Been Filed on Behalf of Panagra for the Route Extension Under Consideration in Docket 779.*

The Circuit Court's opinions direct the Board to ascertain whether an application for the Canal Zone-Florida extension has been filed on behalf of Panagra (R. 373), but the Court has seriously restricted the Board's discretion in determining whether such an application exists. The opinions instruct the Board (R. 371) that "this proceeding should be regarded as a voluntary application for the extension" if "fraud and illegality" are found in Pan American's opposition, and that (R. 431) a mere "consent by a carrier to a 401 (h) extension proceeding begun by the Board is the legal equivalent of a petition for the same extension initiated by the carrier."

The sole power to determine what constitutes an application has been delegated by Congress to the Board. Section 401 (b) of the Act provides as follows:

> "Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the authority shall by regulation require."

Pursuant to that authorization, the Board has adopted regulations (Section 238.1—see portions quoted in Appendix hereto) specifying the form and contents of "applications for certificates of public convenience and necessity *or amendments thereof.*" Nothing which Grace has filed in this case or in Dockets 707 and 744 complies with the requirements of the Board's regulations. It is clear that a reviewing court has no power to disregard or overrule appropriate administrative regulations promulgated in compliance with statutory duty. As this Court said in *Atchison, T. & S. F. Ry.* v. *Scarlett,* 300 U. S. 471, 474 (1937):

> "The regulation having been made by the Commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute."

The Circuit Court's ruling that a mere "consent" is the legal equivalent of an application flies in the face of regulations which are as binding as if enacted by Congress itself. As a matter of fact, nothing filed by Grace in this case could properly be designated a "consent" on behalf of Panagra.

The Board, which is best qualified to determine what constitutes an application, specifically found that no application had been filed on behalf of Panagra, referring at least twice to the "absence of an application from Panagra" (R. 10, 18). Legal interpretations and findings of fact by an administrative agency are entitled to greatest weight. *Brewster* v. *Gage,* 280 U. S. 327, 336 (1930); *Helvering* v. *Kehoe,* 309 U. S. 277, 279 (1940). As this Court said in *Federal Security Administrator* v. *Quaker Oats Co.,* 318 U. S. 218, 227 (1943):

"The review provisions were patterned after those by which Congress has provided for the review of 'quasi-judicial' orders of the Federal Trade Commission and other agencies, which we have many times had occasion to construe. Under such provisions we have repeatedly emphasized the scope that must be allowed to the discretion and informed judgment of an expert administrative body. *Federal Trade Comm'n* v. *Education Society*, 302 U. S. 112, 117; *Gray* v. *Powell*, 314 U. S. 402, 412; *Labor Board* v. *Link Belt Co.*, 311 U. S. 584, 597; see *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141, 144. *These considerations are especially appropriate where the review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged*" (Italics supplied).

Even if it were not clear that the Board considered the matter and made a finding that no application had been filed on behalf of Panagra, it is to be assumed in the absence of proof to the contrary that the Board did its duty, for "there can be no presumption that the Commission disregarded the public or any other interest." *United States* v. *Pierce Auto Freight Lines, supra*, 90 L. Ed. 629, 638.

Moreover, it was universally conceded by the parties throughout the proceeding that no application on behalf of Panagra was pending. Grace conceded that fact both in its petition for reconsideration filed with the Board (R. 92) and in its petition for review filed with the Circuit Court (R. 171).

In the light of the specific regulations defining "applications", the findings of the Board that no application had been filed on behalf of Panagra, and the universal agree-

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ment of the parties, including Grace, that there was no such application, it is submitted that the Circuit Court stepped beyond its function when it instructed the Board that a mere "consent" could be an application, and that an application is involved in this case if Pan American is guilty of "fraud and illegality".

IV. *The Circuit Court Erred in Requiring the Board to Consider and Decide in Docket 779 Any Application On Behalf of Panagra Which Might Be Found to Exist.*

It has previously been demonstrated that no application on behalf of Panagra for the suggested extension is pending in this or any other proceeding. But even if such an application could be supposed to exist, it is clear that the Circuit Court overstepped the bounds of permissible review by ordering the Board to consider and decide such an application *in Docket 779*.

Section 205 (a) of the Act specifically authorizes the Board "to make and amend such general or special rules, regulations, and procedure • • • as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act." Section 1001 further authorizes the Board to "conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice." Clearly the Act contemplates a broad range of discretion in the Board as to the procedure to be followed.

This Court has repeatedly emphasized that administrative discretion as to procedure must be left unfettered so long as it does not seriously infringe due process. In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940), the Court said:

> "• • • the subordinate questions of procedure in ascertaining the public interest, when the Commission's li-

> censing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interests."

In that case this Court specifically refused to do what the Circuit Court sought to do in this case—order the administrative agency to disrupt its established procedure and to decide an application on the record already made.

The reasoning of the *Pottsville* decision applies to this case with greatest force. Although Grace had previously filed its petition under Docket 707 and its complaint under Docket 744, the Board chose to institute an investigation "upon its own initiative" under Docket 779. Grace never objected to such procedure, and never pressed for hearing on Dockets 707 and 744. The Board and all parties have at all times considered Docket 779 to be a purely voluntary investigation, unrelated to the other proceedings instituted by Grace except to the extent that some of the factual issues might overlap. The action of the Circuit Court would have the effect of converting a discretionary proceeding into a mandatory one. It is clear that a court may not so compel an administrative agency to take action which "is regarded as involving the character of judgment or discretion." *Cf. United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540, 543 (1937) and cases cited.

The Circuit Court's opinions rely on *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U. S. , 90 L. Ed. 119, 66 Sup. Ct. 148 (December 3, 1945) to justify the judicial intrusion on the Board's discretion

as to the order of procedure. That case involved a situation where *the administrative agency itself* had held that two applications were *mutually exclusive.* The Court held that, under such circumstances, the granting of one application without a hearing effectively denied the second applicant of a hearing.

No such facts exist in this record, and the Circuit Court's decision appears to be based solely on speculation with respect to this point. As the Circuit Court said (R. 372):

> "*It is not impossible* that should the Board much longer delay, and then decide that the extension should be granted to Panagra, its action *might* be frustrated by the intervening grants of licenses to other carriers" (Italics added).

In support of that thesis the Circuit Court quoted at length (R. 373) *material not in the record* which shows simply that another proceeding involving the same general area is pending before the Board. Such material certainly does not demonstrate that the suggested Panagra extension would or even might be foreclosed by another proceeding. Moreover, if such material were to be considered, it should also be noted that both Grace and Panagra were parties to the other proceeding and were given full hearing, and consequently occupy a quite different status from that of the Ashbacker Company. But of course the Circuit Court could not properly consider facts outside the record. *St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38, 72 (1936); *National Labor Relations Board* v. *Newport News Co.,* 308 U. S. 241, 249-250 (1939); *National Labor Relations Board* v. *Crown Can Co.,* 138 F. (2d) 263, 267 (C. C. A. 8th, 1943). In its opinion on petitions for rehearing (R. 431) the Circuit Court denied that it had relied in any way on such facts,

and therefore it is clear that the decision rests ultimately on the Circuit Court's unsupported conjecture that the granting of other applications in the area *might* foreclose the suggested extension for Panagra.

It is submitted that this Court did not intend the *Ashbacker* decision to be so extended as to stultify the administrative process. If the remote possibility that one application might be foreclosed by the granting of others were to be considered sufficient to require preferred or consolidated hearings, the Board's work would never be done, for new applications are being filed every day. Many old applications are still pending for the reason that the applicants have not sought hearing, or have deliberately requested delay. Such is the case with Grace, for it has relied on the proceeding under Docket 779, and has not sought hearing on Dockets 707 and 744. As a matter of fact, Grace vigorously opposed consolidation of Docket 779 with applications by other parties (R. 420-421).

It is submitted that the *Pottsville* decision is still the law, and that the *Ashbacker* case simply represents one of the rare and extreme cases where *certainty* of injury to a party will cause the reviewing court to interfere with the administrative discretion as to procedure. The remote possibility of injury conjured up by the Circuit Court clearly will not support such interference.

Two points should be noted as illustrative of the harm which would result from the Circuit Court's interference with the Board's procedure. Because no application on behalf of Panagra was considered to be involved in Docket 779, Grace, which was sponsoring the suggested extension of Panagra's route, occupied the position of an intervenor, and was given the opportunity to cross-examine the witnesses representing Panagra. If Grace had been considered an applicant on behalf of Panagra, it would not have had

that right—certainly a substantial one. Hence, the record in Docket 779 would be seriously prejudicial to other parties if it were now to be used to decide a supposed "application" filed by Grace. Procedural defects of this nature are essentially prejudicial. *Edwards* v. *United States*, 312 U. S. 473, 482 (1941).

Also, it should be observed that the Circuit Court has required the Board to determine under Docket 779 whether Pan American should be required to "cease and desist" from its opposition to Panagra's suggested extension (R. 428). Such relief is precisely that sought by Grace in Docket 744 (R. 328), to which Pan American has filed extensive and serious counter-charges against Grace (see Appendix II, pp. 468-470, to Pan American's petition and brief filed in this Court). The Board and all parties have assumed throughout that Docket 744, including Pan American's counter-charges, was to be considered separately. Grace vigorously insisted upon separation of the issues of Docket 744 from the issues of Docket 779 (R. 361). If the procedure now ordered by the Circuit Court were to be adopted by the Board, Grace's charges against Pan American would necessarily be heard in Docket 779, but Pan American's equally serious counter-charges would be deferred to another proceeding or perhaps eliminated entirely through dismissal of Docket 744; and Grace might receive the relief which it sought under Docket 744 while Pan American would obtain no relief and no hearing. Clearly the reviewing court should not so interfere with the Board's procedure where seriously prejudicial results to the parties are inevitable.

It follows that the Circuit Court's decree represents an unwarranted interference with the Board's discretion with respect to procedure.

Conclusion

In view of the foregoing considerations, it is respectfully requested that this Court grant the writ of certiorari sought in the petition annexed hereto, and that, upon review of the decision of the United States Circuit Court of Appeals for the Second Circuit, said decision be reversed, and the orders of the Civil Aeronautics Board involved herein be affirmed.

Respectfully submitted,

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Atlanta, Georgia,
May 24, 1946.

APPENDIX

Applicable Statutory Provisions
(Civil Aeronautics Act)

Section 205 (a) [49 U. S. C., Sup. V, 425]: "The Authority is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act."

Section 401 (a) [49 U. S. C., Sup. V, 481]: "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation * * *"

Section 401 (b): "Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require."

Section 401 (d) (1): "The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the pub-

lic convenience and necessity; otherwise such application shall be denied."

Section 401 (h): "The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate * * *"

Section 1001 [49 U. S. C., Sup. V, 641]: "The Authority may conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice."

Section 1002 (b) [49 U. S. C., Sup. V, 642]: "The Authority is empowered at any time to institute an investigation, on its own initiative, in any case and as to any matter or thing concerning which complaint is authorized to be made to or before the Authority by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Authority shall have the same power to proceed with any investigation instituted on its own motion as though it had been appealed to by complaint."

Section 1006 (a) [49 U. S. C., Sup. V, 646]: "Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in

section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order."

Section 1006 (e): "The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Section 1006 (f): "The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code."

Section 238.1 of Economic Regulations of the Civil Aeronautics Board

"Applications for Certificates of Public Convenience and Necessity—(a) Formal Requirements of Applications. Applications for certificates of public convenience and necessity or amendments thereof, shall meet the requirements set forth in §285.3 of the Economic Regulations as to (1) execution, number of copies and service; (2) verification; and (3) formal specifications of papers.

* * * * *

"(d) General Provisions Concerning Contents. The statements contained in an application shall be restricted

to significant and relevant facts. They shall be free from argumentation or from expressions of opinion, except such as may be required by this Regulation.

• • • • •

"Each application shall give full and adequate information with respect to each of the items set forth in this paragraph. In addition, the application may contain such other information and data as the applicant shall deem necessary or appropriate in order to acquaint the Board fully with the particular circumstances of its case. Among other things, every such application shall contain the following information:

"(1) The full name and address of the applicant, the nature of its organization (individual, partnership, corporation, etc.) and the name of the State under the laws of which it is organized.

"(2) A statement that the applicant is a citizen of the United States, as defined by section 1 (13) of the Act. It is not required that the application shall contain all the evidence which the applicant is prepared to present at the hearing or otherwise in support of such statement, but the application shall at least indicate the nature and result of its investigation in that matter and the character of the evidence it will be prepared to present in support of citizenship.

"(3) An adequate identification of each route for which a certificate is desired, specifying the type or types of service (mail, passengers, and property) to be rendered on each route, and whether or not such services are to be rendered in scheduled operations. The identification of each

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route shall name every terminal and intermediate point to be included in the certificate for which application is made.

"(4) A map (which may be attached as an exhibit) drawn approximately to scale showing all terminal and intermediate points to be served, giving the approximate mileages between all adjacent points, and the principal over-all distances.

"(5) A statement as to the type of aircraft applicant proposes to use in the new service and whether such aircraft is presently owned by the applicant."